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THE EARLY HISTORY OF THE CONTRACT OF INSURANCE.

In this paper I propose to deal with the origins of the contract of marine insurance; with the beginnings of the development of this form of insurance in English law; and with the origins of other forms of insurance.

I. The Origin of the Contract of Marine Insurance.

Insurance has been defined[1] as a contract by which one party (the insurer) in consideration of a premium, undertakes to indemnify another (the insured) against loss. The researches of M. Bensa[2] have proved that the earliest variety of this contract was the contract of marine insurance; that as a separate and independent contract it dates back to the early years of the fourteenth century; and that it was evolved, like so many other of our modern mercantile institutions, in the commercial cities of Italy.[3] As M. Lefort has said, this contract was not devised by a legislator. It was the last term in the evolution of various legal devices invented to provide against the risks of the sea;[4] and though there is no evidence of the existence of an independent contract of insurance before the beginning

[1]Smith, Mercantile Law (11th Ed.) 451.

[2]Il contrato di assicurazione nel medio evo; studi e ricerche (1894); we cite from the French translation, Histoire du contrat d'assurance au moyen age, traduit par Valéry, Introduction par Lefort (1897); Vance, Insurance Law, Essays in Anglo-American Legal Hist. iii, 104-108 gives some account of M. Bensa's conclusions.

[3]Bensa, *op. cit.* 18-24.

[4]"Le contrat d'assurance maritime n'est pas dû au génie d'un legislateur; c'est le dernier terme d'une série d'évolutions par lesquelles s'est manifestée l'idée de prévoyance dans la lutte contre les fortunes de mer, lutte qui devait être d'autant plus vive que de jour en jour augmentait l'importance des vies et des intérêts confiés aux caprices des flots," *op. cit.* Introd. VI.

of the fourteenth century, we can see in these various devices the germs from which this contract was evolved. And, even when in practice it had come to be recognized as a distinct species of contract, it still continued to be disguised under the forms of a sale, an exchange, or a maritime loan, in order to prevent any question whether it was illegal on the ground that it infringed the laws against usury.[5]

Among both the Greeks and the Romans we meet with stipulations, accessory to the contract of carriage, which settled the incidence of the risk of loss of, or damage to the goods carried.[6] For instance, either the carrier[7] or the consignee[8] might guarantee the safe arrival of the goods carried; and the maritime loan—*trajectitia pecunia*—can be analyzed into a contract of *mutuum* with a contract of insurance added to it.[9] The higher interest paid by the borrower represented a premium in consideration of which he was not liable to pay if the ship were lost. Then again we meet, in the earlier mediæval period, mutual associations formed to guard against certain risks of the sea, as for instance against the risks which arose from the issue of letters of marque, or from the practice of reprisals;[10] and at Genoa there was established an institution—the Officium Robarie—to give redress against Genoese citizens who had committed acts of piracy against any trader,

[5]Petrus Santerna, De Assecurationibus Pt. 1, §§ 4-6 (Tractatus Universi Juris VI, Pt. i 348b) cites and refutes various authors who had held insurance contracts void on this ground; as he says § 6 "susceptio periculi simpliciter non facit conventionem illicitam nisi alias sic illicita"; and he argues §§ 10-16 that even a loan of money to X, who pays a premium to the lender to insure it, is not usury.

[6]For some account of these arrangements see Vance, *op. cit.* 99-103; Lefort, *op. cit.* vii; Ashburner, The Rhodian Sea Law, ccxii-ccxxi, gives the fullest account of the maritime loans at Greece and Rome, which are the direct ancestors of the insurance contract.

[7]Thus Cicero states, Epist. ad Fam. II. Epist. 17 (cited Vance *op. cit.* 99) that the government should not bear the risks of the transportation of certain public money from Laodicea—"Laodiceae me praedes accepturum arbitror omnis pecuniae publicae, ut et mihi et populo cautum sit sine vecturae periculo."

[8]Suetonius states that Claudius assumed the risks of corn transported to Rome, Life of Claudius V c. 18 (cited Vance *op. cit.* 99)—"Nam et negotiatoribus certa lucra proposuit, suscepto in se damno si cui quid per tempestates accidisset."

[9]Lefort, *op. cit.* vii; *cf.* Ashburner, *op. cit.* ccxvi, ccxvii; Dig. 22.2.1. thus defines *pecunia trajectitia*—"Trajectitia ea pecunia est quae trans mare vehitur . . . videndum an merces ex ea pecunia comparatae in ea causa habentur? et interest, utrum etiam ipsae periculo creditoris navigent: tunc enim trajectitia pecunia fit."

[10]Lefort, *op. cit.* vii. n. 4.

which really gave a sort of state insurance against this particular risk.[11]

More immediately connected with the development of the contract of insurance were the stipulations as to risk introduced into the ordinary commercial contracts of the thirteenth century. Indeed M. Valery thinks that, in the thirteenth century, some of these contracts *e. g.* contracts of sale or loan, were never intended to be sales or loans, but insurances.[12] Thus in the contract of *"commenda"*, under which *A* advances money or other property to *B* to trade with, there is usually a stipulation as to the party on whom the risk of accidental loss is to fall.[13] In the contract of *mutuum* it is probable that, though it evaded the canonical prohibition of usury by calling itself *mutuum "gratis et amore"*,[14] the lender often paid over the money advanced with a deduction, in consideration that nothing should be payable if the money were lost by accident, and such a deduction is, as M. Bensa has said, a true premium of insurance.[15] Similarly contracts of sale or exchange (*cambium*) were used to disguise transactions intended to operate as loans at sufficient interest to compensate the lender, both for the use of his money, and for the provision that nothing was to be payable if the money were accidentally lost.[16] The form of a contract of sale was adapted to this purpose as follows:—"Instead of *B* buying goods with money lent by *A*, *A* buys the goods himself and sells them to *B*, and the price which *B* agrees to pay will be (*a*) payable at a future date; (*b*) contingent upon the safe arrival at

[11] *Ibid.* 3.

[12] Contrats d'assurance maritime du XIIIe siècle (1916), in which he analyses certain documents printed by Blancard, Documents inédits sur le commerce de Marseille.

[13] Bensa, *op. cit.* 2, 3. "Les clauses relatives aux risques figurent de très bonne heure dans les contrats de commande, car on conçoit aisément l'intérêt du commandité à s'affranchir de toute responsabilité a raison des cas fortuits dont pouvaient avoir à souffrir les marchandises qui lui étaient confieés."

[14] *Ibid,* 3.

[15] Bensa, *op. cit.* 3, 4—he conjectures that "Les intérêts étaient prélevés dès le moment de la formation du contrat sur la somme prêtée, exactement comme cela se pratique encore aujourdhui pour l'escompte des effets de commerce. S'il était possible de démontrer la vérité de cette conjecture, il faudrait voir dans cette retenue operée au profit du prêteur, le payement d'une prime d'assurance en retour de laquelle il assumait les risques du prêt."

[16] Bensa, *op. cit.* 3 n. 2 tells us that in the notarial acts at Genoa we find the expressions, *nomine accomendationis, nomine venditionis et puri cambii, mutuo gratis et amore,* used quite indifferently.

the place of payment, either of the original goods or the goods into which they have been converted; and (*c*) sufficient to meet the sum paid by *A* with maritime interest. Similarly in the case of exchange, *B* received coins from *A* on the terms of paying different coins (which would be of a different value) at another time or place; and according as the coins were at the risk of the borrower or lender the value of the coins to be returned would differ.[17] The difference between the rates of exchange, according as the money was repayable in any event, or only on the prosperous termination of the voyage, represents again a premium of insurance.[18] As M. Bensa has said,[19] it is only necessary to split up such arrangements into their component parts in order to arrive at the idea of an independent contract of insurance. "It would only be necessary for a third person to intervene between a purchaser who intended to purchase goods arrived safely, and a vendor who wished to throw on the purchaser the risks of the sea, and to offer to take these risks for the sum, which the course of trade and the rate of exchange had fixed as the difference in the price, according as one or other party took these risks."[20]

In 1347 we have in the archives of Genoa what is perhaps the oldest contract of insurance; and the archives of Florence show that, in the first twenty years of this century, it was an ordinary commercial transaction in the principal commercial towns of Italy.[21] But, as we have seen, the contracts in which the market value of the element of risk had been thus worked out were chiefly contracts of maritime loan, and all were concerned with the risks incurred in transport—generally by sea.[22] It is not surprising

[17]Ashburner, *op. cit.* ccxxv; Bensa, *op. cit.* 9.

[18]Bensa, *op. cit.* 9, tells us that there are, "innombrables exemples de contrats de change accompagnés de l'une des deux clauses, 'rendu sauf à terre', ou 'aux risques de mer'. Dans la *Pratica della Mercatura* de Pegolotti p. 200, on voit que, selon qu'une lettre de change tirée de Florence sur l'Angleterre renfermait l'une ou l'autre de ces clauses, le banquier percevait une commission de 10 sous, ou bien seulement de 20 petit sous par 100 marcs. La difference de ses deux taux montre que, dans le premier cas, on payait une véritable prime d'assurance."

[19]Bensa, *op. cit.* 10.

[20]*Ibid.* 10.

[21]Bensa, *op. cit.* 20, *et seq.* Some have wished to maintain that Portugal was the place from which the contract came; Bensa has proved the correctness of the opinion of Stypmann and Pardessus that it comes from Italy.

[22]We do find, however, that the risks of transport by land were insured; Bensa, *op. cit.* 22, says that it appears from the Florentine documents that contracts of insurance were made "non seulement en vue des risques des marchandises sur mer, mais aussi en vue des risques du transport par

therefore to find that when the contract of insurance first appears as an independent contract it is modelled on the maritime loan, which developed into the contract of bottomry.[23] No very large modification was needed. In the maritime loan the debtor, who has borrowed the money, declares that he has received the sum advanced, and promises to restore an equivalent sum on the safe arrival of the ship or goods: in the insurance the assurer plays the part of the debtor, states that he has received the amount for which the ship or goods are insured, and promises to repay it in the event of the ship or goods not arriving safely.[24] It was only natural that the earliest insurers should be shipowners—they could charge a smaller premium because they could more easily guarantee a safe arrival;[25] and it was inevitable that those who drew up the earliest contracts of insurance should be the same persons as those who were in the habit of drawing up contracts of loan on bottomry.[26] Hence it was from the latter contract that some of the most important of the technical terms applicable to insurance at the present day, (such, for instance as 'policy' and 'premium') were originally taken.[27]

But later in the century the form changed. It came to be modelled on a sale;[28] and the analogy of a sale was used to explain its incidents. The contract of sale was adapted to the purposes of an insurance by regarding the property insured as sold to the insurer, subject to a resolutive condition in the event of its safe arrival. It was for this reason that the goods were at the insurer's risk during the whole of the voyage, and that he could

terre"; further it seems, *op. cit.* 46, that the premium for these risks was about half that for maritime risks; but even in the middle of the seventeenth century this form of insurance was comparatively rare; Marquardus De jure mercatorum et commerciorum II.13.11 says, "Illa est super rebus quae terra, haec quae mari transvehuntur; rara illa frequens haec".

[23] *Ibid.* 28.

[24] Il y avait, toutefois, une difference: tandis que dans la prêt à la grosse le débiteur, c'est a dire l'emprunteur, déclarait avoir reçu la somme qui lui était vraiment avancée et s'engageait à restituer une somme équivalente en cas d'arrivée à bon port; dans l'assurance, au contraire, le débiteur, c'est a dire l'assureur, feignait d'avoir reçu la somme assurée, s'engageant à la payer à l'assuré dans le délai convenu, sauf dans le cas d'arrivée à bon port du navire ou des marchandises," Bensa, *op. cit.* 28.

[25] *Ibid.* 24.

[26] Lefort, *op. cit.* xi.

[27] *Ibid.* xi, xii; *cf. ibid.* xii, n. 2 citing Straccha, De Assecuratione Gl. xv. 2 who says, "Trajectitia pecunia instar cujus assecuratio inventa est".

[28] Bensa, *op. cit.* 28—at Genoa, "A partir de 1368, dans tous les actes génois d'assurance, l'assuré s'oblige à payer la somme assurée nomine venditionis et puri cambii."

sue for their recovery during this period.[29] Two important principles of insurance law flowed from this conception. In the first place, the insured must be the owner, or at least have some interest in the property insured.[30] A man cannot transfer to another what he does not own. Therefore from the first the contract was a true contract of indemnity, and not a mere wager on the safe arrival of ship or merchandise.[31] In the second place if the ship or goods did not arrive safely, and the resolutive condition failed to operate, the insurers were entitled to so much of the property insured as could be recovered.[32]

During the fourteenth century the business of insurance grew and flourished. In the first half of the fourteenth century Florentine and Genoese merchants treated the cost of insurance as a regular part of the cost of transport.[33] Genoa seems to have been the centre of the insurance business. Societies of insurance brokers, employed solely in this business, were known there,[34] and that their business flourished can be seen from the fact that on a single day in 1393, a single Genoese notary made more than eighty insurance contracts.[35] The growing popularity of the contract naturally caused it to become still further separated from the contract of loan on bottomry, or the contract of sale. Shipowners, as such, ceased to act as insurers; and the magnitude of the sums assured led to the practice of several persons joining in the contract, by writing their names under the policy, with the proportion of the sum assured for which they were prepared to

[29]Two passages from the Consilia of the Genoese lawyer Bosco, cited Bensa, *op. cit.* 29, 30 make this quite clear—"Si contingeret res vel merces, super quibus facta est assecuratio, perdi, assecurator solvit pretium et valorem pro quo assecuravit, et recuperat merces quae sunt suo periculo a se emptae, si recuperari possunt"; and, "Si contingat res illas super quibus est facta securitas capi, dictae res tanquam effectae assecuratorum pro parte qua assecuraverunt super ipsis, per eos vindicantur et recuperantur, et de ipsis tanquam propriis disponunt, quasi tanquam res venditae ex die contractae assecurationis toto viagio fuerint ipsorum emptorum et assecuratorum periculo."

[30]Bensa, *op. cit.* 34.

[31]*Ibid,* 34.

[32]n. 29. ante.

[33]Bensa, *op. cit.* 21—citing as authority the books of Francesco del Bene and Company, of Florence.

[34]*Ibid.* 48.

[35]*Ibid.* 47; Bosco in no. 369 of his Consilia (there cited) says, "Marcus propter lucrari fecit plures assecurationes sicut faciunt plurimi mercatores de Janua quorum aliqui de nullo alio vivunt quam de hujusmodi quaestu, qui quandoque est utilissimus, quandoque damnosus, secundum discretiones assecurantium et secundum cursum temporum et fortunae blandimenta vel adversiones."

answer.[36] Moreover the form of the contract tended to grow less elaborate. Its legality being now fully recognized, it ceased to be disguised under the form of a loan or a sale. It came to be regarded as a distinct species of the large genus innominate contract, reducible to the formula *"do ut facias*—I the insured give a premium that you the insurer may undertake a risk."[37]

In early days there was no rule as to the form in which the contract must be drawn up. There is reason indeed to think that, in the earlier part of the fourteenth century, contracts of insurance were sometimes made verbally.[38] But the procedural advantages obtained by getting the contract drawn up in writing by a notary or a sworn broker led the parties in almost all cases to adopt this method of contracting.[39] In the first instance these contracts were sometimes very informally drawn. Mere notes of the necessary clauses to be inserted in the agreement were taken.[40] Probably the instrument was embodied in complete form only if it was necessary to take legal proceedings upon it.[41] But it is clear that the practice of employing sworn brokers will lead to the evolution of a stereotyped form. The form which the brokers of Genoa, Florence, and Pisa evolved in this century has in substance shaped the policies of our modern law.[42] It was substantially the form on which Straccha[43] commented in the sixteenth century; and it was the form which many governments in the same century, partly for fiscal reasons, and partly on account of the con-

[36]Bensa, *op. cit.* 24.

[37]Straccha, De Assecuratione, Introd. 47—"Et illud quaeritur, rem tuam mari vel terra exportandam salvam fore promisi periculum suscipiens, et periculi gratia pretium, an nominatus seu magis innominatus contractus censeatur? Et innominatum contractum esse censit Baldwinius . . . suscipio enim periculum ut des . . . et sic facio ut des;" equally also, if looked at from the point of view of the insurer it is a contract of "Facio ut des", for these innominate contracts, "judicantur diversi modo, ex parte dantis est do ut facias, ex parte vero facientis est facio ut des, non inspecto ordine contrahendi, sicut in emptione et venditione, locatione, et similibus."

[38]Bensa, *op. cit.* 34—"Les documents que nous possédons admettent, en effet, la possibilité de conclure le contrat *cum scriptura vel sine.*"

[39]*Ibid.* 30.

[40]See the specimen cited Bensa, *op. cit.* 31, 32.

[41]*Ibid.* 31.

[42]"Les polices florentines et pisanes étaient assez conformes, dans leur ensemble, aux polices modernes . . . Aussi convient il peut-être de conjecturer qu'a Gènes également les polices d'assurance contenaient ces clauses detaillées dont les polices florentines et pisanes nous revelent l'usage, et qu'elles differaient par là des instruments dressés par les notaires", Bensa, *op. cit.* 33.

[43]De Assecuratione; the form is at the end of the Introd., and the rest of the treatise consists of 40 Glosses on the form; the form is dated 1567; *cf.* Bensa, *op. cit.* 33.

venience of having one definite form which all traders understood, made obligatory for all insurance contracts.[44]

This growth of the practice of insurance caused in the first place the ascertainment and elaboration of the rules of law governing the contract, and in the second place its regulation by statutes which were passed, either in the interests of the state, or in the interests of the parties to the contract. Since these rules and statutes are the basis of the insurance law observed in Europe and in England at the present day, we must glance briefly at them.

(1) We have seen that, from the first, the contract of insurance was a contract of indemnity, and that therefore the person insured must have some interest in the subject matter of the insurance. This requirement sometimes gave insurers the opportunity of evading their obligations, and led to the insertion of clauses which bound the insurers to pay whether or not the insured had any interest.[45] But the prevalence of these clauses soon gave rise to the serious evil of facilitating, by means of insurance, mere wagering contracts on the safety of ships or other property insured.[46] The merchandise assured was, in the earlier contracts, described with some minuteness, which gave place, in later contracts, to a more general description.[47] The ship on which the merchandise was loaded, was described; and the names of the captain, the consignor, and owner were inserted.[48] It was very rarely that the ship was not designated, and the insured allowed to load in any ship he pleased.[49] At first the insurance was always for the voyage. Time policies (which never exceeded a year) were however introduced in the course of the fourteenth century.[50] From the earliest time the route was prescribed; and any deviation, unless allowed by the policy, avoided the contract.[51] The risks

[44]See Magens, Insurances ii, 4-7 for two forms of policy prescribed at Florence by the ordinance of 1523.

[45]Bensa, *op. cit.* 35, citing Bosco, Consilia 392 p. 611—"Nisi instrumenta assecurationam essent ita lati et ampli tenoris, fatui essent facientes se assecurari quia assecuratores propter non solvere mille cavillationes excogitarent."

[46]*Ibid.* 36.

[47]Bensa, *op. cit,* 37—eventually, "Ou on vient même à ne plus specifier que les objets precieux et certaines categories de marchandises; pour toutes les autres, on employait la formule générale *super rebus, et mercibus.*"

[48]*Ibid.* 38.

[49]*Ibid.* 38, 39.

[50]*Ibid.* 39.

[51]*Ibid.* 39-41—the question what amounted to a deviation seems to have given rise to a good many questions.

against which the insurance was made were generally carefully specified; but generally they excluded risks arising from the barratry of the master; and sometimes certain other risks also.[52] Sometimes the policy specified a time within which, in default of news, the ship was to be presumed to be lost.[53] In case of capture and rescue it was a disputed point as to whether the insurers were liable to pay.[54] The better opinion seems to have been that they were liable; and policies sometimes provided that they should not be liable, if they redeemed the goods and delivered them safely at their destination.[55] The one duty of the assured was to pay the premium; and this payment must always be made in advance.[56] Sometimes provision was made for the cancellation of the policy and the return of the premium, if *e. g.*, owing to the abandonment of the voyage, the risk was never incurred.[57]

(2) The earliest legislation[58] on the subject of insurances comes from Genoa and Florence. The earliest enactment is a Genoese statute which comes from the last quarter of the fourteenth century.[59] It was directed to the prohibition of insurances on foreign ships—a prohibition which was never very effectual, and was shortly afterwards repealed,[60] and to laying down certain other conditions as to the validity of the contract. For instance, insurances made after the loss was known were declared to be void; and the loss was deemed to be known if any one person had heard the

[52] *Ibid.* 42-44; see especially the clause taken from a Florentine policy of 1397 cited at p. 43—"Les risques que les assureurs courent . . . sont ceux de Dieu, de la mer, des gens, du feu, du jet à la mer, de la retention par le fait des Seigneurs ou des Communes ou de toute autre personne, ou de représailles, ou d'arrêt, et de tout autre cas, peril, fortune, empêchement ou sinistre qui, de quelque façon que ce soit, pourrait se produire, ou se serait produit, et quels que puissent être les cas et dans quelques conditions qu'ils se réalisent, excepté ce qui pourrait concerner le lest et la douane."

[53] *Ibid.* 44.

[54] Bensa, *op. cit.* 44; for similar doubts in English law see below, p. 106.

[55] Bensa, *op. cit.* 44.

[56] *Ibid.* 45—as M. Bensa says, this custom as to payment in advance may have originated when the contract took the form of a fictitious sale; under this form the assurer declared that he had received the sum for which the property was insured; and, when the contract took this form, "l'assureur n'aurait pas eu d'action pour en poursuivre le payement"; later this custom passed into enacted law.

[57] *Ibid.* 46, 47.

[58] On this legislation generally see *ibid.* chaps. v-vii.

[59] *Ibid.* 52—we have not got its text, but we can gather its substance from the commentary contained in the Consilia of Bosco; it must be before 1383, as an addition to it was made in that year. *Ibid.*

[60] Bensa, *op. cit.* 54—repealed in 1408 for fiscal reasons; for similar laws elsewhere and their modification see *ibid.*, 53, 81-85.

news.[61] Other statutes were passed to impose a tax upon insurances,[62] to settle the form of the contract,[63] and to provide a short and effective procedure for the enforcement of claims upon insurance policies.[64] Towards the end of the fifteenth century, the greater freedom allowed to the parties to make what terms they pleased, led to an increase in the practice of making insurance contracts solely for the purpose of wagering; and the legislature at Genoa made attempts to prohibit them, which were not very successful.[65] But none of these statutes covered very much ground. It is to the statutes of Barcelona that we must look for the first comprehensive code of insurance law.[66] These statutes, as finally codified in 1484, have had a large influence upon the insurance law of the rest of Europe, partly because, being printed and circulated with the Consolato del Mare, they shared its fame and influence;[67] and partly because, being compiled at a later period than the earliest Italian legislation, the law was more settled, and therefore better fitted for codification.[68] They were a model for the various codes of insurance law which the chief trading countries of Europe passed in the sixteenth and seventeenth centuries.[69]

This legislation is comprised in five statutes which were passed at Barcelona from 1435-1484. They deal with all aspects of insurance law, and settle the leading principles which underlie it. The statute of 1435[70] is the basis of the later law. Among other topics it deals with the capacity of the parties,[71] insurances on foreign ships,[72] the proportion which the value of the property insured

[61] *Ibid.* 52, 53—the loss is known if it has come to the knowledge of a single person.

[62] Genoa (1401) *ibid.* 53.

[63] Florence (1523) Magens, Insurances ii, 1, § 2.

[64] Bensa, *op. cit.* 72-80; see *e. g.* the Venetian law of 1468, cited *ibid.* 80.

[65] *Ibid.* 84-88, 104; M. Bensa seems to dispose successfully of the view of Prof. Vivante that the growth and extension of insurance contracts was due to the use made of them to make wagers; as M. Bensa says, "Assurément, les paris ont contribué à augmenter le nombre de ces contrats; mais ce n'est qu'après qu'ils étaient déjà devenus fréquents, grâce à la réalité du besoin auquel ils donnaient satisfaction."

[66] For the text of the statutes see Pardessus, Lois Maritimes, v. 493-554, 507-543; they are summarized by Bensa, *op. cit.* chap. vi.

[67] Bensa, *op. cit.* 50.

[68] Bensa, *op. cit.* 50, 51, 57, 58.

[69] For the text of some of these later laws see Magens, *op cit.* ii, 23-30—Antwerp 1563; *ibid.* 30-49—Spanish ordinances of 1556, 1588, and 1618.

[70] Pardessus, *op. cit.* 493-502.

[71] § 3.

[72] § 1.

must bear to the amount of the insurance[73] the rules as to presumption of loss,[74] the regulation of insurance brokers,[75] the payment of the premium,[76] the form of the contract,[77] the procedure to enforce it.[78] Some small modifications were made in the following year,[79] and in 1458[80] considerable modifications were made in the direction of allowing greater freedom to insurers and insured.[81] Additional rules were made as to the payment of the premium,[82] as to proof of the loss,[83] and as to the procedure to enforce the contract;[84] and there were some new rules as to the cancellation of the policy when the risk was not incurred.[85] In 1461[86] evasions of the rules as to insurances on foreign ships, by making use of the machinery of a sale or a loan, were prohibited. In 1484[87] all these rules were summed up in the comprehensive code which, as I have said, has had so large an influence on the development of the law throughout Europe.[88] The chief change made was the abolition of all restrictions on the insurance of foreign ships,[89] but this freedom obviously tended to encourage mere wagering policies. In order to discourage them, insurances on ships or cargoes sailing beyond the Straits of Gibraltar were prohibited, unless they were destined for Barcelona;[90] and the rules were made to suppress the

[73] §§ 2, 4.
[74] § 15.
[75] §§ 8, 17-20.
[76] § 11.
[77] § 9.
[78] §§ 12-14.
[79] Pardessus, *op. cit.* 502-504.
[80] *Ibid.* 507-521.
[81] § 1.
[82] § 12.
[83] § 14.
[84] §§ 8, 9, 18-22.
[85] §§ 14, 15.
[86] Pardessus, *op. cit.* 521-523.
[87] Pardessus, *op. cit.* 523-543.
[88] "Les véritables *Ordinacions sobre les seguretats,* qui, traduites en plusieurs langues, ont exercé une si grande influence sur la jurisprudence maritime de la Mediterranée, et aux quelles l'on a coutume de se référer quand on parle de la portée de lois de Barcelone, ne sont pas autre chose que l'ordonnance de 1484, ou la matière reçut sa réglementation définitive," Bensa, *op. cit.* 67.
[89] § 1.
[90] § 2; as Bensa says, *op. cit.* 68—"Les assurances *in quovis* n'étaient pas admises par le droit maritime catalan. La crainte des simulations et des paris, qui avait inspiré cette restriction, était telle qu'elle eut pour résultat de faire defendre absolument les assurances portant, soit sur les marchandises . . . voyageant au dela du détroit de Gibraltar . . . soit sur les bâtiments naviguant dans les mêmes parages."

practice of insuring non-existent cargoes.[91] Further provisions were made to invalidate contracts made after the loss had occurred,[92] and as to the presumption of loss from the non-receipt of news.

These statutes give us, as M. Bensa has said, a very complete picture of the insurance law of the fifteenth century. They are, as I have said, especially important in the early history of this contract in England and in other European countries; for it was the Italian and Spanish insurance law of this century which was already making its influence felt in the trading cities of the Netherlands, and was soon to make its appearance in England.[93] To its adventures in England we must now turn.

(2) The Introduction and Development of the Contract of Marine Insurance in England.

As we might expect, the earliest mention of a policy of insurance in England is to be found among the records of the court of Admiralty. Insurance, as was pointed out in a sixteenth century petition to the Council, "is not grounded upon the lawes of the realme, but rather a civill and maritime cause, to be determined and discided by civilians, or els in the highe courte of the Admiraltye."[94] This earliest policy is to be found in the record of the case of *Broke* c. *Maynard*[95] (1547), in which an action was brought by the insured on a policy written in Italian, and subscribed by two underwriters. The action was defended on the ground that the insurers had already paid part of the sum, and that they had received no part of goods which had been salved. It was further alleged that there had been a deviation. The case clearly shows that at this date the practice of insurance was well known in England; and that this was the fact was specifically

[91] § 9.

[92] § 17.

[93] Genoese underwriters were established at Bruges in 1370, Bensa, *op. cit,* 101; "L'Espagne d'abord et pour peu de temps d'ailleurs, puis la Flandre, l'Angleterre et la France, en recueillant les traditions et les coutumes de l'Italie, lui succédèrent dans la mission de les développer conformément aux transformations amenées par la marche du temps, et aux formes nouvelles du commerce terrestre et maritime," *ibid.* 105.

[94] Select Pleas of the Admiralty (S. S.) ii, lxxvi.

[95] Select Pleas of the Admiralty (S. S.) ii, 47; possibly the case of Emerson *c.* de Sallanova (1545) *ibid,* lxvi, which turned upon a claim on an indemnity given against the withdrawal of a safe conduct by the king of France, may be an earlier case of insurance; *cf.* Vance, Essays in Anglo-American Legal Hist. iii, 110.

stated in the case of *Ridolphye* c. *Nunez*[96] (1562), in which the custom in the city of London of making insurances through agents is thus set out in the pleadings: "The use and custome of makynge bylls of assuraunce in the place commonly called Lumbard Strete of London, and likewyse in the Burse of Antwerpe, is and tyme out of mynde hath byn emongst merchants usinge and frequentinge the sayde severall places, and assuraunces used and observed, that the partie, in whose name the bill of assuraunce is made, ys not bounde to specifie in the same whether the goods assured are for his owne or for any other man's accompte. . . . And yf any mysfortune chauncethe to the same gooddes in such sort assuryd, the sayde partie, in whose name the byll of assuraunce is made, maye demande and oughte to recover them againste the assurers by vertue of the sayd custome as his owne propre gooddes, although they perteyne to some other. . . . And further he doothe alledge that commonly merchants, by all the tyme above declared, have and doo cause ther gooddes to be assured from porte to porte by ther factors and other ther frends havinge noo interest or propretie in the gooddes assured, and yet thassuraunce goodd, and thassurers bounde tanswere the losse of such gooddes yf any happen."

The Italian origin of insurance law is clear on the face of the policies which we find in the records of the court of Admiralty.[97] The earliest policy which appears there is, as we have seen, written in Italian;[98] and in form they are very similar to the Italian policies of this period. A comparison between some of them, and the form of policy prescribed by the Florentine legislation of 1523,[99] will make this quite clear. They are not of course precisely similar. They are not drawn up in one stereotyped form, and they therefore vary both in length and in contents. Some are quite short, while others contain larger and more elaborate clauses. Two policies contain a "sue and labour" clause;[100] and a Dutch policy of 1638 contains a renunciation of the Antwerp Insurance orders, and an agreement to submit to arbitration in the case of any disagreement.[101] But the clause which nearly all the English policies of

[96]Select Pleas of the Admiralty (S. S.) ii, 52, 53; in 1573-4 insurance is referred to as an ancient custom among merchants, Dasent, Acts of the Privy Council, viii, 195-6.

[97]Select Pleas of the Admiralty (S. S.) ii, 45-59.

[98]*Ibid*, 47.

[99]Magens, *op. cit.*, ii, 4-7.

[100]Select Pleas of the Admiralty (S. S.) ii, 56, 58, 59; below note 149.

[101]Select Pleas of the Admiralty (S. S.) ii, 59.

this period contain—which in a modified form our modern policies of marine insurance still retain—to the effect that this policy shall be of as much force and effect as the surest writing or policy heretofore made in Lombard Street,[102] probably had the result of producing a uniformity in the legal effect of all these policies. It showed that the parties intended to incorporate into their contracts the rules of the law merchant generally understood to be applicable to them;[103] and it therefore enabled the parties to appeal to, and the court to apply, these rules in any litigation which might arise.

The growth of England's foreign trade in the latter part of the sixteenth century increased the importance of insurance law; and, from 1574 onwards, we find that the Council is beginning to consider the expediency of putting this new business under some form of regulation, and of providing some means by which the rights of the parties under an insurance contract could be quickly and easily enforced. That the Council might be informed as to the actual rules observed, an order was sent in 1574 to the Lord Mayor of London to collect and certify the orders made and the rules applied by the merchants in matters of insurance.[104] But nothing was done this year, although the order was repeated.[105] In 1575 the Lord Mayor was further directed to fix the prices for making and registering policies of insurance.[106] But apparently nothing was done, as later in the same year he was again directed to summon experienced merchants and civilians, and, with their help, to collect this information and reduce it to writing;[107] and it was necessary to repeat the order in 1576.[108]

[102]In the policy of 1547, *ibid,* 48, the clause runs as follows: "As for the aventure that the assurers shall stande at, it is to be understoode that this preasente writinge hathe as muche forse as the beste made or dicted byll of surance which is used to be made in this Lombarde Streete of London"; in the form of marine insurance set out in the first schedule to the Marine Insurance Act 1906, 6 Edward vii, c. 41, it runs as follows: "And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London."

[103]Thus the Council tell the Lord Mayor, whom they had directed to write down the rules and orders relating to insurance, below note 104, to follow the customs of other countries as to the fees payable.

[104]Dasent viii, 321.

[105]*Ibid,* 337.

[106]Dasent viii, 397.

[107]*Ibid,* ix, 43 (1575).

[108]*Ibid,* 163—"Whereas letters have been often written to him and his predecessours to consider for some order to be made for matters of assuraunce, the wante whereof doth dailie brede grete trobles, he is now required to sende unto their Lordships without delaie that hath been

In the meantime the Council had resolved to act upon its own knowledge, and to adopt two measures, which may well have been suggested by the practice of other commercial nations. In the first place they proposed to regulate the business of insurance by setting up an office for the making and registering of insurances. In the second place they proposed to create a special commission, consisting of merchants and civilians, for the speedy trial of these cases, in order that the merchants might, "the better followe theire trades without incomberaunce or molestinge the one the other by suites at lawe, bothe to the hinderance of traffick and of her Majesty's customes."[109]

The regulation of the business of insurance took the form, usually followed in the sixteenth century both in England and abroad, of the grant to an individual of a monopoly right to make and register insurances, and to charge fees for his services.[110] It was a plan which provided regulation, and, not only paid its own way, but also might be made to provide some revenue to the government. About the year 1574 a grant was made to Richard Candler, giving to him and his deputies the sole right of making and registering "insurances and policies and other instruments belonging to merchants."[111] It is not surprising to find that both the notaries[112] and the brokers[113] protested; and very probably it was

doune in that behalf, and also the perfect note of the rates that hath ben set downe for the registering of assuraunces, and therein to use the more expedicion for that, upon the certaine knowledge thereof, their Lordships are to procede therein to the furtheraunce of her Majesties service."

[109]That this was their object was stated in a letter written by the Council to the Chief Justice of the King's Bench and the Judge of the Admiralty in 1601, Dasent xxxi, 253; as it was said in a petition to the Council in 1570, "the matter * * * constethe and standeth muche uppon the orders and usages of merchauntes by whom rather than by course of law yt may be forwarded and determyned," Select pleas of the Admiralty (S. S.) ii, lxxvi.

[110]See the regulations for the registration of insurances contained in the Guidon de la Mer, cited Martin, History of Lloyd's 42-44; and it would seem that there was a similar office at Antwerp, *ibid,* 39.

[111]We have an account of this monopoly in the protests against it made by the notaries and brokers, which John Strype printed in his edition of Stow's Survey (published 1720) ii, 142; Martin, History of Lloyd's, 36-41 has also given the material portions.

[112]The notaries (sixteen in number) stated that they, "lived upon the making of policies, intimations, renunciations and other writings granted unto the said Candler," and that this grant would mean their utter overthrow; *cf.* Scott, Joint Stock Companies iii, 364.

[113]The brokers (thirty in number) complained that the grant was a gross infringement of the liberty of the subject, and prophesied that it would open the door to many inconveniences to the merchants—"If all this serving merchants occasions should be committed to one particular person,

the delay caused by these objectors which caused the Lord Mayor to be so slow in returning to the Council the information about insurances which it desired him to collect.[114] Notwithstanding this remonstrance, the grant took effect, and it is probable that it was the origin of the "Office of Assurances" mentioned in the statute of 1601.[115] But in order to meet the objectors the Council, as we have seen,[116] directed the Lord Mayor of London to nominate commissioners to consider the question of fees and regulations. These commissioners proceeded to settle the fees which could be taken in the Office, and to make regulations which permitted others, besides Candler and his deputies, to draw up policies.[117] To this Candler not unnaturally made objections which are contained in a paper which he sent to Walsingham in 1576.[118] It is probable that the rates found by the commissioners were accepted as fair by the government. On the other hand it is pretty clear that the government insisted upon all insurances being registered at the office, and perhaps upon the sole right of making them conferred upon Candler or his deputies.[119] As it was said in a marginal note on Candler's petition, it was on these provisions in the patent that the government relied for the redress of "deceipt in Assewraunces;"[120] and, though the notaries and brokers remained unsatisfied, there is really no evidence that the merchants seriously objected.[121] After all, similar regulations were in force in continental countries.

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it were not possible but great discommodities and losses would happen to many for lack of dispatch * * * that it would be a great bondage to merchants to be tied to one particular person, who might either for favour or reward dispatch one man, and for displeasure or ill-will delay another."

[114]Above, p. 98.

[115]43 Elizabeth c. 12; Malynes, Lex Mercatoria (3rd Ed.), 105, 106.

[116]Above, p. 98.

[117]Martin, History of Lloyd's, 39-41.

[118]"Yf evvery man maye make pollicies that will, the case will be souche that the saide Richard Candeler shal not have the regestringe of the tenthe pollecy of assewraunce that shal be made, for that he shall not knowe on whom to complayne for not registring their assewraunces. And so his said office shall not be able to cowntervaille his charges," *ibid,* 40.

[119]Dasent, ix, 177 (1576); Martin, *op. cit,* 40.

[120]"So longe as every man maye make his owen pollecy the decipt in Assewraunces will nevir be redressed, which is the greatest cause of the erection of the saide Office," Martin, *op. cit.* 40, 41. It was probably owing to the trouble over Candler's Patent that in 1576 one Henriques Roderiguez petitioned for a monopoly of the brokerage of insurances, promising to pay half the penalties imposed on those who infringed this monopoly to the Queen, Select Pleas of the Admiralty (S. S.) ii, xvi.

[121]It would appear from the letter of the Council in 1601, Dasent xxxi, 252-3, that the merchants complained, not of the existence of the regulations, but of their ineffectiveness.

For the trial of insurance cases the Council appointed a body of commissioners. We have not got a list of commissioners; but it would appear that they consisted of merchants and civilians,[122] and that the judge of the court of Admiralty was the chief commissioner.[123] Whether or no they included any common lawyers I cannot say. But in at least one important case merchants, civilians, and common lawyers were included in the commission.[124] The object which the Council had in view was, as they explained at a later date, to provide that "soche dyfferences as might fall out betwixt merchantes touchinge this matter should be handled and decyded amonge themselves by soche as have best knowledge and experience in those affaires."[125] It is thus clear that, here again, the Council intended to follow foreign precedents, and establish a mercantile court consisting of both merchants and lawyers, which should administer mercantile custom without those formalities of procedure and pleading which delayed the hearing of cases in the regular courts of law.

But, though tribunals of this kind were found to be perfectly satisfactory on the continent, this tribunal set up by the Council was not a success. In 1601 the merchants "that use to assure goodes" stated, in a petition to the Council, that the orders made by the merchants and confirmed by the Council were not obeyed; and that some refused "to submytte and conforme them selves to the order of Commyssioners appointed to heare those causes, beinge chosen of skillfull merchantes and sworne by the order of the Lord Maior to deale indyfferently and uprightlie, to the great trouble of honest traders and the incouradgement of soch merchantes as have no meanynge to performe their bergaines."[126]

The reason for the failure of the insurance commissioners is probably to be found in the fact that both the Court of Admiralty and the courts of common law continued to exercise a competing

[122]Dasent, x, 232 (1578); xi, 360, 293 (1579-80); xii, 25, 69, 199 (1580); see *ibid*, 199, 200 for a case sent to them by the Council and recommended by the French ambassador—apparently the insurers had refused to pay.

[123]*Ibid*, xiii 359-360 (1581-2); on one occasion, xiv, 214 (1586) four civilians were appointed arbitrators, and on another occasion two civilians and the judge of the Admiralty, xx, 202 (1590-91).

[124]*Ibid*, ix, 168, 230 (1576)—the persons named were the Master of the Rolls, Justice Southcote, Sir Thomas Gressham, Dr. Hamond, Dr. Forde, Edward Osburne, Alderman Barne, Thomas Alderzey, Benedict Spinola, and Hectour Nonnez; and later the two Chief Justices were added; it was stated that the case was, "so strainge as requireth the advice and consultacion of such as be experienced in those kinde of dealinges."

[125]Dasent, xxxi, 253.

[126]Dasent, xxxi, 252, 253.

jurisdiction; and that both were eager to retain and to enlarge it. In 1547 the Admiralty proceeded against a plaintiff for contempt because he had sued in the city of London court;[127] and in 1556 it proceeded against another plaintiff because he had sued before a commission appointed by the Chancellor.[128] In the common law courts we have it is true only one reported case during this century of an action upon a policy of insurance.[129] But the action of assumpsit, as developed in the latter part of this century, was quite capable of affording a remedy upon those policies; and Malynes[130] tells us that many such actions were brought. It is clear that these competing jurisdictions afforded many opportunities to the dishonest and the litigious. Such persons could put pressure on their opponents by a refusal to submit to the summary jurisdiction of the commissioners, which compelled them to have recourse to a formal trial before a law court.[131] And, even if the case were brought before the commissioners, it would seem that they sometimes declined to obey their orders, perhaps under the plea that legal proceedings were pending in the Admiralty or at common law. The fact that the Council had not given, and indeed could not give, exclusive jurisdiction to these commissioners was fatal to their efficiency.

In consequence of the petition of the merchants to the Council in 1601,[132] the Chief Justice of the King's Bench and the Judge of the Admiralty were directed to hold an enquiry;[133] and the result of this enquiry was a resolution to strengthen the jurisdiction of the commissioners by giving them statutory authority. The statute of 1601, which was passed with some difficulty through Parliament,[134] evidently intended to set up for London a com-

[127]Broke *c.* Maynard, Select Pleas of the Admiralty (S. S.) ii, 47.

[128]*Ibid.* lxvii.

[129]A case of 1589 cited in Dowdale's case (1606) 6 Rep. at p. 47 b.

[130]*Op. cit.* 106—he explains that he attended before the committees engaged on the Act of 1601, and that it passed with some difficulty, "because there were many suits in Law by action of Assumpsit before that time, upon matters determined by the Commissioners for Assurances, who for want of power and authority could not compel contentious persons to perform their ordinances."

[131]"Of late years divers persons have withdrawen themselves from that arbitrarie course, (*i. e.* settlement by arbitration) and have soughte to drawe the parties assured to seeke their moneys of everie severall Assurer, by Suites commenced in her Majesties Courtes, to their greate charges and delayes," 43, Elizabeth c. 12 Preamble.

[132]Above.

[133]Dasent xxxi, 252, 253.

[134]Malynes, *op. cit.* 106.

mercial court of the ordinary continental type for the hearing of actions upon policies of marine insurance. The preamble sets out the antiquity, the prevalence and the advantages of the custom of marine insurance, and recites the measures taken to decide the controversies arising by the arbitration of commissioners. The statute then enacts that the Lord Chancellor shall be empowered to appoint a standing commission to hear all cases arising upon all policies of insurance entered in the London office of insurances. This commission was to consist of the judge of the Admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight "grave and discrete merchants." These commissioners, or any five of them, were to adjudicate upon insurance cases "in a briefe and summarie course, as to theire discretion shall seeme meete withoute formalities of pleadinges or proceedings."[135] They were given power to examine on oath, or to commit to prison those who disobeyed their final decrees.[136] An appeal from their decision could be brought to the Court of Chancery; but execution was not to be suspended pending an appeal.[137] The commissioners were to be sworn to act honestly, and no commissioner interested in any case could take any part in the decision of that case.[138]

Thus a commercial tribunal of the continental type was for the first time established in England by statutory authority. But it suffered from two grave defects. *Firstly,* its jurisdiction was confined to policies registered in the London Office of Insurances, so that it did not extend to insurances made in other sea port towns. *Secondly,* it did not exclude specifically the jurisdiction of the courts of common law and the Court of Admiralty. It is possible that, if the King and Council had continued to exercise the control over the courts which they exercised in the Tudor period, these defects might have been remedied. But the constitutional controversies of the seventeenth century were fatal to institutions which depended upon the prerogative. The Office of Insurances seems to have disappeared; and the new court was left to wage an unequal contest with the victorious common law. There was indeed an attempt in 1662 to remedy certain minor

[135] § 1.
[136] § 2.
[137] § 3—the sentence must be satisfied or the money deposited with the Commissioners.
[138] § 4.

defects in the act.[139] For instance, the necessary quorum was reduced from five to three;[140] and power was given to punish parties or witnesses who refused to appear,[141] to make orders against the person or goods of a defendant,[142] and to issue commissioners to examine witnesses beyond the sea.[143] But these amendments were wholly ineffectual in the face of the determined opposition of the common lawyers. They held that a judgment of the court was no bar to subsequent proceedings at law;[144] that they could hear disputes only as to policies of marine insurance;[145] and that, even in these cases, they could only act when it was the assured who was plaintiff.[146]

The natural result was that during the sixteenth and seventeenth centuries the law of insurance was in a very backward state. Neither in the Court of Admiralty in the earlier part of this period, nor in the courts of common law and equity in the latter part, were any very general or certain rules evolved. This will appear clearly if we glance rapidly at one or two of the decisions of these tribunals.

In the Court of Admiralty it is assumed in several cases that the contract of insurance is a contract of indemnity. It follows that the insurer who has paid is entitled to the goods salved, on paying salvage for them;[147] and that if goods salved were not made over to the insurers, they were not liable to pay the sum assured.[148] It was in order to induce the insured to do their utmost to salve the goods for the benefit of the insurers that the "sue and

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[139]13, 14 Charles II c. 23.

[140]§ 2.1.

[141]§ 2.2.

[142]§§ 3.2, 5.1.

[143]§ 3.1.

[144]Came *v.* Moye (1658) 2 Sid. 121.

[145]Denoyr *v.* Oyle (1649) Style 166-7—There was however a doubt whether the court might not have jurisdiction on a life policy if the assured was going to sea "on merchants affairs."

[146]Delbye *v.* Proudfoot (1693) 1 Show. 396.

[147]Select Pleas of the Admiralty (S. S.) ii, 149 (1573), Lopez, an insurer, gets recaptured goods, paying salvage.

[148]Cavalchant *c.* Maynard (1548) *ibid.* ii, 45—in a defence to an action on a policy it is stated that, "Yf any of the goods so assured shulde within the tyme of assurance * * * fall to any wrack * * * and yet sume parte of the same happen to be savyd that parte * * * which shulde be so saved * * * oughte to be devyded equallye betwene thassurers * * * accordinge to every assurers proporcion * * * before any assurance can be demanded of them;" Broke *c.* Maynard (1547) *ibid.* ii, 47; cf. *ibid.* ii, lxx (1573) action for freight on wine brought to London by insurers after the ship had been wrecked.

labour" clause was inserted in these policies.[149] It is fairly clear that deviation was a defence to an action on a policy;[150] and that no news of a ship for a year was presumptive evidence of its loss.[151] We can see the influence of the continental rules in the assumption that a reassurance is invalid;[152] but apparently an insurance upon the goods of alien enemies was at this period valid[153]—though, after some conflict of opinion, such insurances have been finally decided to be invalid.[154] It is clear too that the benefit of a policy could be assigned.[155]

In the courts of common law it was clear that deviation was fatal to the policy;[156] but that for a loss occurring before the deviation the insured could recover.[157] There were also a few cases as to the interpretation of the risks borne by the insurers. It was held at law that pirates were a "peril of the sea",[158] and in equity that the term "restraint of princes" did not cover a restraint due to the wilful default of the insured.[159] The ship and goods insured were at the peril of the insurers till the ship arrived and was unloaded, if the policy was so expressed;[160] but in England, as abroad, there was some doubt as to the insurers liability if the ship

[149] *Ibid.* ii, 56—a French policy of 1565; 58—a Dutch policy of 1638; in the former policy the clause runs, "And we gyve to him * * * ample powar to helpe and gyve order for to save them said shippes and marchandises or part of the same to sell and distribute them yf ned be aswell to our prouffytte as dommage withowte asking us leave or license. And we shall paye all charges averedge and expenses whiche shall beren at the sewte and saving of them said shippes and merchaundisses be yt that there be anything recovered or not."

[150] Broke *c.* Maynard (1547) *ibid.* ii, 47.

[151] De Salizar *c.* Blackman (1555) *ibid. ii,* 49; *cf. ibid.* lxviii (1562-3)—a year and a day is the period stated; it was to obviate questions of this kind that the clause "lost or not lost" was inserted in insurances, Malynes, *op. cit.* 107.

[152] Ravens *c.* Hopton (1561) Selected Pleas of the Admiralty (S. S.) ii, 120.

[153] *Ibid.* ii, xv, lxviii (1562-3); lxx (1569-70); *cf.* Park, Marine Insurance (1st Ed.) 15, 16; and see above for the earlier continental rules.

[154] Furtado *v.* Rogers (1802) 3 B. and P. 191, overruling Lord Mansfield's view in Planche *v.* Fletcher (1779) 1 Dougl. 251.

[155] Duckett *c.* Barne (1570) Select Pleas of the Admiralty (S. S.) ii, 143.

[156] Green *v.* Young (1702) 2 Salk. 444; this decision is really the converse to earlier cases which held that loss after a deviation enabled the holder of a bottomry bill to sue, Western *v.* Wildy (1684) Skin. 152; *cf.* Williams *v.* Steadman (1694) Holt, K. B. 126.

[157] Green *v.* Young (1702) 2 Salk. 444.

[158] Pickering *v.* Barkley (1672) 2 Rolle Abr. 248,—the merchants gave evidence that this was the view held by the court for assurance cases; s. c. reported by Style, 132; *cf.* Barton *v.* Wolliford (1688) Comb. 56.

[159] (1690) 2 Vern. Ch. 176.

[160] Anon. (1685) Skin. 243.

was captured and then recaptured before being taken *infra prasidia*.[161] It was clear that when the ship had been taken *infra prasidia* and condemned, the original owner lost his property in her;[162] and Holt ruled in 1699 that, as the property in the ship was gone, the insurer was freed from liability.[163] But, as late as 1712, the question was treated as open to argument, though the court inclined to adopt Holt's view.[164] There was an important case, noticed by several reporters, upon the stipulation that the ship is "warranted to depart with convoy". It seems to have been settled that the stipulation was satisfied if she so departed, even though she was afterwards separated by tempest, and captured.[165] The question of the possibility of parol variations of a policy gave rise to two decisions.[166] It was settled both at law and in equity that if the risk was not run the premium could be demanded back;[167] but the court of equity[168] differed from the courts of law,[169] and held that if the insured had no interest the policy was void. Whether the fact of having advanced money on bottomry was a sufficient interest was not perfectly clear.

It is obvious that these few cases cover very little ground. It is also obvious that it was owing to the defects of the procedure of the common law courts and the court of equity that the cases were so few. At common law it was necessary to bring a separate action against each of the underwriters; and either the underwriters or the insured could compel their opponent to proceed to trial on all these actions.[170] If a case was reserved, counsel were

[161]Above, p. 93.

[162]Anon. (1642) March N. R. 110.

[163]Anon. (1699) 1 Ld. Raym. 724.

[164]Assievedo *v.* Cambridge (1712) 10 Mod. 77—a report of the arguments of the civilians; on this argument the court inclined in favour of the insurer, but the point was ordered to be argued by the common lawyers in the following term; *cf.* Park. *op. cit.* 81-2.

[165]Jefferies *v.* Legendra (1692) Carth. 217; s. c. 3 Lev. 321; 2 Salk. 443; 1 Show. 320—a long report of the argument for the plaintiff; 4 Mod. 58; *cf.* Lethulier's Case (1693) 2 Salk. 443; Bond *v.* Gonsales (1704) 2 Salk. 445.

[166]Kaines *v.* Sir R. Knightly (1682) Skin. 54; Bates *v.* Grabham (1703) 2 Salk. 445.

[167]Martin *v.* Sitwell (1692) 1 Show. 156; Deguilder *v.* Depeister (1684) 1 Vern. Ch. 263.

[168]Goddard *v.* Garrett (1692) 2 Vern. Ch. 269; Harman *v.* Vanhatton (1716) 2 Vern. Ch. 716.

[169]Assievedo *v.* Cambridge (1712) 10 Mod. 77 at p. 80; Depaba *v.* Ludlow (1721) 1 Comyns 360.

[170]Park, *op. cit.* xli; *cf.* Goram *v.* Fouke (1672) 2 Keble 722; and the preamble to 43 Elizabeth c. 12, cited above note 131.

left to draw it up at their leisure.[171] These cases were often argued in private, so that the decision could never be a guide to any future case.[172] In fact not much guidance could be expected from such of these cases as were heard in open court, since both judges and counsel were ignorant of even the meaning of the ordinary technical terms used by merchants and seamen;[173] and the judge consequently left the case to the jury without any explanation of the principles applicable.[174] It was apparently the custom always to hear two arguments;[175] and in these, as in other cases, it was always possible to delay the proceedings at law by filing a bill in equity.[176] Nor was the court of equity any more satisfactory. Its delays were notorious.[177] It was out of touch with commercial life and ways of thought. The somewhat overfine standards of morality which it was beginning to require were hardly suited to the world of trade. A court, for instance, which could decide that it would not assist the holder of a bottomry bond because it carried unreasonable interest,[178] which refused to accept the value set upon the goods in a valued policy,[179] was obviously out of touch with the elementary principles of commercial and maritime law applicable to these transactions.

If we compare the state of the law of insurance at the end of the seventeenth century with its state at the end of the sixteenth century, we can see that it has made no appreciable progress. At neither period has there been any legislation, comparable to that of continental states, directed against obvious abuses, such as the

[171]Park, *op. cit.* xliii.

[172]*Ibid.* xlii.

[173]See Pepys, Diary, iii, 363-5 for an amusing account of the trial of an insurance case in 1663 before Hyde *C. J.* at the Guildhall—"It was pleasant to see what mad sort of testimonys the seamen did give, and could not be got to speak in order; and then their terms such as the judge could not understand; and to hear how sillily the counsel and judge would speak as to the terms necessary in the matter, would make one laugh."

[174]"In former times the whole of the case was left generally to the jury, without any minute statement from the bench of the principles of law, on which insurances were established; and as the verdicts were general, it is almost impossible to determine from the reports we now see, upon what grounds the case was decided," Park, *op. cit.* xlii.

[175]*Ibid,* xliii.

[176]Holdsworth, Hist. Eng. Law Vol. i, 405; Thus in Harman *v.* Vanhatton (1716) 2 Vern. Ch. 716, a defendant, having recovered on an insurance, brought an action on a bottomry bond; a bill was then filed in equity to stay this action, which was dismissed.

[177]Holdsworth, Hist. Eng. Law Vol. i, 218-222, 225, 226.

[178]Dandy *v.* Turner (1701) 1 Eq. Cas. Abr. 372; *cf.* the remarks on this case made by Park, *op. cit.* 477, 478.

[179]Le Pypre *v.* Farr (1716) 2 Vern. Ch. 716.

practice of cloaking mere wagers under policies of insurance. At neither period has much progress been made in the work of converting those mercantile customs and that continental jurisprudence, which Malynes describes,[180] into ascertained rules of English law. In one respect indeed there has been a retrogression. The business of underwriting was subject to some sort of control in the sixteenth century; but, in the seventeenth century, that control ceased with the disappearance of the Office of Assurances. It was not till the early part of the following century that the legislature attempted to repress some of the abuses which were disfiguring the law; and it was not till later in that century that Lord Mansfield evolved from mercantile custom and foreign precedents the principles of our modern law. Similarly we must look to the same period for the humble beginnings, at Lloyd's coffee house, of the voluntary association which has supplied, far more efficiently than any governmental institution, that measure of control over the business of underwriting which had been attempted by the Council in the sixteenth century.

(3) The Origins of Other Forms of Insurance.

I have dealt so far only with marine insurance. During the whole of this period it was by far the most important branch of insurance law. It was the only branch which the Council attempted to regulate: it was the only branch which the legislature noticed.

Analogous to insurances against the risks of transport by sea are insurances against the risks of transport by land. We have seen that this species of insurance was known abroad;[181] and perhaps it was known in England[182]—though there is not much evidence as to this.[183] Gradually, in addition to these insurances of

[180] *Op. cit.* c. c. xxv, xxvii, xxviii.

[181] Note 22 *ante.*

[182] Malynes, *op. cit,* 107—"Other assurances are made upon goods and merchandises sent by land from one place to another, by the conductors or carriers to *Venice, Frankford,* or any other places, wherein the goods commonly are declared, and the mark also: and this manner of assurance is especially performed by the conductors, who take for the charges a certain allowance for every pound weight that the goods do weigh, and moreover, 2, 3 or 4 upon the hundred pounds in value that the said goods are esteemed to be worth: and he doth appoint a sufficient guard of souldiers to convey the same by land and rivers to the places intended, which nevertheless by a stronger power have many times been taken by the freebooters."

[183] Scott, Joint Stock Companies iii, 374 n. 2 cites the Merchant's Dayly Companion (1684) 355, in which mention is made of insurances of goods "sent by wagon or cart etc. by land from all robbers or thieves."

property against the risks of transport, insurances against other dangers to property developed. But, during the sixteenth and seventeenth centuries the only other danger to property which could be insured against was danger by fire; and as yet it was only houses that could be insured.[184] As early as 1591 a system of fire insurance was in operation in Hamburg; and proposals to establish this kind of insurance in England had been made in 1635 and 1638.[185] But it was not till after the Great Fire that it was actually established. In 1667 Barbon established an office which, in 1680, was transferred to a company.[186] In 1682 the City of London started a rival undertaking.[187] About the same time two partners established a mutual society known as the Friendly Society; and in 1696 another mutual society, known as the Hand in Hand, was started.[188]

But, before fire insurance had developed, insurances against risks, not to property, but to the person were known both on the continent and in England. Of the early history of this form of insurance I must say a few words.

In modern times the contract of insurance against risks to the person takes the form either of life or accident insurance; and both are very different in character to the insurances against risks to property. Life insurance is a contract of indemnity in so far as it enables the insured to make provisions against death or the incapacities of old age. But it is also both in England[189] and elsewhere[190] a method of investment; and it is this aspect of the contract which is the most important, and causes it to differ

[184]It was not till 1706 that Charles Povey founded an office to insure against losses of goods and merchandise by fire. Scott, Joint Stock Companies iii, 374.

[185]*Ibid.* iii, 372.

[186]*Ibid.*

[187]*Ibid.* iii, 373; Lutterell's Diary i, 135.

[188]Scott, Joint Stock Companies iii, 373; it is there pointed out that there was a difference between the Joint Stock and the mutual societies—"the former, through the security deposited in the names of trustees. were in a position to pay claims, even although the sums, received from premiums, had already been exhausted. A mutual society on the other hand was constituted on the basis of exacting less for premiums, and making up any deficit, when required, by a levy upon its members."

[189]Below, notes 192, 193.

[190]Bensa, *op. cit*, 89—"L'assurance sur la vie, telle qu'on la concoit aujourd'hui, n'est, à proprement parler, un véritable contrat d'indemnité. Au fond, cet acte de prévoyance revient à n'être que l'accumulation des épargnes qu'il est loisible à tout particulier de faire selon sa condition de fortune, le rôle de la Compagnie qui assure se bornant à garantir à l'assuré qu'une mort prematurée ne viendra pas empêcher la formation du capital qu'il a entrepris de constituer par ses économies."

essentially from insurances against risks to property. The latter class of insurances are, as have seen,[191] simply contracts of indemnity. The result is that, if the loss occurring from the happening of the risk is otherwise made good, the insurer is not liable because the loss has not been incurred. On the other hand, the contract of life insurance is not simply a contract of indemnity. It is an absolute promise to pay at the death of the insured a fixed sum of money, in consideration for the payment of certain premiums during life, the amount of which is calculated by reference to the probable duration of the life insured.[192] The amount insured is payable whether or not any loss is incurred as a result of the death; and in this important respect the contract of accident insurance resembles the contract of life insurance.[193]

During this period we can see nothing resembling the modern contracts of life or accident insurance. The statistical knowledge which has rendered those contracts possible in modern times was wholly wanting;[194] and even if it had been available, it is probable that the dangers and uncertainties of life in a comparatively turbulent age would have made these contracts commercially impossible. But we do see in Italy in the Middle Ages, and in England during the sixteenth and seventeenth centuries a few insurances against certain risks to the person, which we can re-

[191]Above.

[192]This is clearly explained by Page Wood, *V. C.* in Law v. London Indisputable Life Policy Co. (1855) 1 Kay and J. at p. 228. "Policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payments;" *cf.* Dalby *v.* India and London Life Assurance Co. (1854) 15 C. B. at p. 387, "Life Assurance" said Parke B., "is a mere contract to pay a certain sum of money on the death of a person, in consideration of due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of his life."

[193]Bradburn *v.* The Great Western Railway (1874) L. R. 10 Ex. 1.

[194]Valery, Les Origines De L'Assurance sur le vie 7-10; Pardessus, *op. cit.* v. 331, 332 thought that it was possible that the contract of marine insurance was able to be developed in Italy because the progress made in mathematical studies gave insurers some basis for the calculation of risks; but, as Bensa, *op. cit.* 47, 48 says, as yet no proof of the truth of this conjecture has appeared. The fact that it was marine insurance that was principally developed, and the fact that the risks were pretty constant and well known, would seem to point to the fact that the risk was calculated by the practical instinct of the parties to the contract. As Bagehot says, Economic Studies, 9, "Men of business have a solid judgment—a wonderful guessing power of what is going to happen—each in his own trade."

gard as the germs from which our modern life and accident insurances have grown up.

M. Bensa has shown that in Italy in the Middle Ages there are instances of contracts of insurance against certain kinds of risks to the person.[195] There are insurances against risks of pregnancy,[196] against death by the plague,[197] or against death generally for a certain limited period.[198] It is interesting to note that in some of these policies, as in modern life policies, there are stipulations as to the parts of the world to which the insured may travel. But it is probable that these insurances were never very frequent—the definition of the contract of insurance given by Straccha in the sixteenth century does not cover them.[199] Consequently they never developed, as marine insurance developed, into an independent form of contract. The specimens which M. Bensa has collected are in the form of a sale. The insurer declares that he has bought a certain amount of property from the insured, and that he has promised to pay a fixed price for this property by a certain date—this date being that on which the risk terminates. The fixed price represents the amount of the insurance. It is then declared that if a certain event—the risk insured against—does not happen, the money is not to be payable.

There is some evidence that contracts of this kind were known in England during this period.[200] In the only two cases on the

[195]According to Petrus Santerna, De Assecurationibus et Sponsionibus Mercatorum, Pars Secunda §§ 7-21, the legality of insurances upon various miscellaneous events was determined by considering whether a stipulation, made conditional on the happening or not happening of these events, would have been valid. As "omnis causa non inhonesta, etiam extranea, justificat stipulationem" (§ 18), so on all events not illegal or immoral an insurance can be made; apparently even mere wagering contracts (§§ 21-23) are valid, provided that the wager is not made upon any illegal game or event—though, "Magis solatii causa quem lucri concipiuntur."

[196]Bensa. *op. cit.* 90-94; at Genoa a person accused of illicit connection with another's slave was presumed to be the father of the child, if the slave, and her master and mistress (being persons of good repute) swore to their belief in his guilt, and there was any other corroborating fact; such a person was liable to a heavy fine, which was doubled if the slave died; it was this risk which was frequently the subject of insurance.

[197]*Ibid.* 97.

[198]*Ibid.* 95.

[199]De Assecuratione, Introd. 46—"Assecuratio est alienarum rerum, sive mari, sive terra exportandarum periculi susceptio, certo constituto pretio."

[200]Valery, Les Origines de L'Assurance sur la vie, 5 cites from the records of the Court of Admiralty a case of 1583 between the representatives of one William Gibbons and persons who had insured his life, in which the former were successful; he gives no reference to the record.

subject which have got into the books we have an insurance upon the life of one who was going abroad,[201] and an insurance upon the life of a certain person for one year.[202] In other words we get, as in the Middle Ages, insurances in view of certain definite risks, or for a definite period. But, from Malynes' account, it would seem that these insurances were beginning to be used more extensively than in the Middle Ages. He says:[203] "Other Assurances are made upon the lives of men, for divers respects, some because their estate is meerly for term of life, and if they have children or friends to leave some part of their estate unto, they value their life at so many hundred pounds, for one or more years, and cause that value to be assured at five, six, ten, or more for every hundred pounds, and if he do depart this life within that time, the assurors pay the money; as it happened of late, that one being ingaged for Sir Richard Martin knight, Master of the Mint, caused £300 to be assured upon the life of the said Sir Richard, being some ninety years of age, and therefore gave twenty and five *pro centum* to the assurors: the ancient knight died within the year, and the said assurors did pay the money. Also one Master Kiddermaster having bought an office of the six clerks of the Chancery, and taken up money of others, caused for their assurance for many years together two thousand pounds to be assured upon his life after four and five in the hundred, until he had paid that money; which is very commodious. Likewise a traveller undertaking a voyage to Jerusalem or Babylon, delivering out money payable at his return, will providently assure a sum of money upon his life, either to secure some men that do furnish him with money to perform his voyage, and to put forth the greater sum, or to leave some means unto his friends, if he should die and never return."

Malynes makes it clear that these kinds of insurances against personal risk were beginning to be used somewhat as they are used in modern times. It was beginning to be discovered that, "men cannot invent or imagin anything but the value of it may be assured."[204] But as yet this discovery was a new thing. It is

[201]Denóyr *v.* Oyle (1649) Style 166-7.

[202]Sir Robert Howard's case (1700) 2 Salk. 625; s. c. I Ld. Raym. 480.

[203]*Op. cit.* 107.

[204]Malynes, *op. cit.* 107; this is illustrated by a tale about a lottery told by Pepys, Diary IV, 192; in this lottery each ticket cost £10 and there was only one blank, and, says Pepys "the wisest man I met with was Mr. Cholmley, who insured as many as would, from drawing of the one blank for 12d; in which case there was the whole number of persons to

not till the eighteenth and nineteenth centuries that the legal incidents and consequences of these new forms of insurances, whether against personal risks or against risks to property other than risks of transport, begin to be defined.

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one, which I think was three or four hundred. And he so insured about 200 for 200 shillings, so that he could not have lost if one of them had drawn it, for there was enough to pay the £10; but it happened another drew it, and so he got all the monèy he took;" in the calendar of House of Lords MSS ii (N. S.) p. 196 no. 1009 there is mention in 1695-6 of an appeal to the House (which never came to a hearing) which turned on "policies of insurance concerning the taking or not taking of towns"; it is curious to note that the defendant in his case asserted that a policy when endorsed and transferred "thereby became as good as a bill of exchange"; Holt's campaign against promissory notes, L. Q. R. xxxii, 33-36, was to a large extent caused by these loose notions as to negotiability.